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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 303

ALICE LEE GROSJEAN,

Appellant,

versus

AMERICAN PRESS CO., INC., ET ALS.,

Appellees.

Appeal from Final Decree of Injunction by Three Judges Sitting in the District Court for the Eastern District of Louisiana.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

Opinion Below.

The opinion of the statutory court of three judges is reported in *10 Federal Supplement, 161.*

Appellate Jurisdiction.

Paragraph 1 of Rule 12 has been complied with.

Statement of the Case.

This is an appeal from a final decree of three judges, sitting according to statute in the District Court, by which

a privilege tax law of the State of Louisiana, being *Act No. 23 of the General Assembly of 1934* (printed copy of Act in appendix), is declared unconstitutional, and by which the Supervisor of Public Accounts of the State of Louisiana is permanently enjoined from attempting, in any manner, to enforce any of the provisions of said Act as against any of the appellees, or from seeking to collect from any of them, by suit or otherwise, the tax levied by said Act. (R. 100).

The appellees are nine corporations, all creatures of the State, organized and existing under and by virtue of its laws. (R. 1).

Each of them independently own and publish one or more newspapers within the State, with a circulation of more than 20,000 copies per week therein; and they are all engaged in the business of selling or charging for advertisements to be printed or published in their newspapers. (R. 3).

The appellant, the Supervisor of Public Accounts of the State of Louisiana, is the officer designated in the statute to ascertain and collect the tax levied thereunder.

Under the statute every person, firm, association or corporation engaged in the business of selling, or making any charge for, advertising or for advertisements, whether printed or published, or to be printed or published, in any newspaper, magazine, periodical or publication whatever having a circulation of more than 20,000 copies per week in the State, is required to pay a license tax for the privilege of engaging in such business, fixed at 2% of the gross receipts thereof. *(Sec. 1).*

The statute fixes October 1, 1934, as the date for the filing of the first report for the period from August 1, 1934, to September 30, 1934, and thereafter reports are due on the first day of January, April, July and October for the preceding quarter of the year. *(Sec. 2).*

The tax is due on the day following the last day of the quarter year, as to the business done during such quarter, becomes delinquent thirty days thereafter, and bears interest at the rate of 1% per month from the due date until paid. *(Sec. 7).*

Provision is made for the refund of payments made in error, and for judicial review of any assessment made by the Supervisor. *(Secs. 4 and 5).*

The only method for enforcing payment of the tax is by suit, in a court of competent jurisdiction, for the amount of the tax and interest, and the Supervisor is authorized to demand an additional 25% on the total as attorney's fees, to be taxed as costs and included in the judgment rendered. Execution of the judgment can only take place as provided by the existing laws of the State. *(Sec. 8).*

Any violation of the Act by a person is a misdemeanor punishable by a fine not exceeding five hundred dollars or imprisonment not exceeding six months, or both. When it is a corporation which violates the Act the district attorney may sue for and recover not exceeding $500.00 for each violation. *(Sec. 9).*

On September 20, 1934, forty days before appellant could have attempted to enforce the provisions of the Act,

appellees resorted to the expedient of presenting a joint petition to the Judge of the United States District Court for the Eastern District of Louisiana, in which they assailed the constitutionality of the statute on the following grounds:

> (1) It violates the provisions of Section 8 of Article X of the Constitution of Louisiana of 1921, which require that license taxes must be levied on all persons engaged in the business taxed.
>
> (2) It violates the equal protection clause of the Federal Constitution.
>
> (3) It violates the provisions of Section 3 of Article I of the Louisiana Constitution prohibiting the passage of any law to curtail or restrain the liberty of speech or of the press.
>
> (4) It violates the provisions of Section 1 of the Fourteenth Amendment which provide that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty or property without due process of law. (R. 6).

Jurisdiction in the District Court of the United States is asserted on the theory that the suit is one of a civil nature arising under the Constitution of the United States, brought to redress the deprivation, under color of said Act 23 of 1934, of certain rights, privileges and immunities secured to plaintiffs by the Federal Constitution; that the tax as to each of the petitioners, except three of them, would amount to more than Three Thousand Dollars PER ANNUM, exclusive of interest, costs, fines and penalties; that as to the excepted three the tax, exclusive of interest and costs, but inclusive of fines and penalties im-

posed by the Act, would exceed the sum of Three Thousand Dollars PER ANNUM; that a specific monetary value could not be placed on the business with which the enforcement of the statute would interfere, but the damage caused thereby would exceed Three Thousand Dollars as to each of the plaintiffs. (R. 10).

The District Judge granted a temporary restraining order which forbade appellant from attempting, in any manner whatsoever, to enforce the provisions of the Act as against any of the appellees, or from seeking to collect the tax imposed by said Act from any of them by **SUIT** or otherwise. (R. 12).

On hearing of the rule for a preliminary injunction, appellant moved to dismiss the bill for want of an affirmative showing of jurisdiction; also for an insufficiency of allegations constituting a valid cause of action in equity. In the alternative, appellant moved that certain argumentative, impertinent, and scandalous and libelous statements in the bill be stricken therefrom. In the further alternative, that the appellees be required to make a further and better statement of the nature of their complaint. Appellant denied that appellees, or any of them, were in danger of suffering irreparable or other loss or injury, denied the asserted unconstitutionality of the statute; and specially pleaded that she, as an officer of the State of Louisiana, and the State of Louisiana, by the restraining order already issued and by a preliminary injunction, if one issued, forbidding the bringing of a suit to enforce the statute, had been and would be deprived of the rights granted by the Act of Congress of March 4, 1913, amend-

ing Section 266 of the Judicial Code; and that as the bill presented a controversy *in personam* no injunction should issue to preclude her from bringing an action *in personam* against appellees in any court of concurrent jurisdiction. (R. 57).

After hearing, the three Judges denied all of appellant's motions; overruled all her pleas; declared the statute unconstitutional; and temporarily enjoined her to the same extent as had been done under the restraining order. (R. 93).

In its findings and conclusions on the interlocutory application, which were adopted as the findings and conclusions for the final decree, the court made no reference whatsoever to the pleadings and the affidavits filed on behalf of appellant, but proceeded with its findings of facts and conclusions of law practically as though no defenses or proof whatsoever had been urged and presented by her.

All of the facts favorable to the appellees taken from their pleadings and affidavits are recited in the court's findings of fact.

On the important question of its jurisdiction the court satisfied itself with the bare declaration: "The court is of the opinion that defendant's plea to the jurisdiction should be dismissed". (R. 94).

Appellant established the following facts which are not referred to in the court's findings:

The country journal with circulation limited both as to area and number has been practically eliminated as a source of commercial advertising. (R. 62-92).

Such journals depend upon job printing and legal printing for their very existence. (R. 69-90).

Metropolitan dailies cover the entire state and have circulation even beyond its borders, while the small country journal limits its activities to one parish or to a few adjoining parishes. (R. 70-92).

The country weekly is regarded as a civic institution, whereas the large dailies are huge commercial enterprises. (R. 74).

According to the National Editorial Association of America the ratio of advertisement to other matter in a successful newspaper should be 66⅔ advertisement to 33⅓ other matter. The ratio is reversed in small country journals. (R. 87).

By stipulation, the matter was submitted for final decision on the same pleadings and evidence as upon the application for the interlocutory injunction, without further argument, but with renewal and full reservation of all of appellant's motions, pleas and defenses. (R. 99).

The three Judges found it necessary to consider only the grounds of unconstitutionality predicated on classification. Though in its conclusions of law the court recognized a difference between the urban and metropolitan press, it deemed that difference insufficient to meet the requirements of the Federal and State constitutions. (R. 98).

Upon what basis of fact or law the court took jurisdiction, and where it found the necessity for equitable interference does not appear.

A final decree was entered by the three Judges denying, for the reasons given on the interlocutory application, the motions to dismiss for lack of jurisdiction and of a cause of action in equity; dismissing the motions to strike and for particulars; holding the statute unconstitutional, and permanently enjoining appellant, as Supervisor of Public Accounts of the State of Louisiana, her agents, attorneys, representatives and other persons acting under her direction, from attempting in any manner whatsoever to enforce any of the provisions of the Act as against any of the appellees, or from seeking to collect from any of them, by **SUIT** or otherwise, the taxes sought to be imposed by the said Act, or from requiring any of them to make reports required by said Act, or from attempting under the authority of said Act to examine any of their books, records and other documents. (R. 100).

Specification of the Assigned Errors Intended to Be Urged.

Appellant intends to urge all of the fourteen errors assigned. (R. 103).

Specifically appellant will urge:

1. That the District Judge should not have assumed jurisdiction of this cause when on the face of the bill it appeared that the complainants were not citizens of the United States, that there was no diversity of citizenship, and there was no positive averment of fact showing that the tax complained of amounted to Three Thousand Dollars as to each of them.

2. That the court of three Judges should likewise have declined jurisdiction, and maintained the motion to dismiss, for lack of sufficient aver-

ments in the bill to overcome the presumption of lack of jurisdiction.

3. That neither the District Judge nor the statutory court should have taken jurisdiction where the averments of the bill were evidently made for the purpose of creating a case cognizable by the United States Court when no jurisdiction in fact exists.

4. That when under complainants' own evidence it was established that the tax in dispute was less than Three Thousand Dollars as to all of them but one, the plea to the jurisdiction should have been maintained.

5. That the motion to dismiss for lack of equity should have been granted where the bill, seeking to enjoin the collection of a tax, on its face failed to aver facts bringing the case within some clear ground of equity jurisdiction.

6. That an injunction should not have issued against an officer of a state to prevent the collection of a tax where neither the facts averred in the bill, nor those adduced by evidence, showed any great and irreparable injury to be imminent or to have been threatened, or to be even possible.

7. That where the only action which can be taken by a state officer in the enforcement of a statute is through judicial proceedings, no case is presented for relief by injunction.

8. That the District Judge in granting the restraining order prior to the time when suit could have been brought by the defendant, and the statutory court in granting the interlocutory injunction and in making said injunction permanent, each of which prohibited the bringing of suit by defendant in a court of competent jurisdiction of the state, deprived defendant of the benefits of Sections 265 and 266 of the Judicial Code.

9. That where a tax is collectible only by suit and judgment, which can be executed only as are other judgments rendered by the state court, there is no occasion for interference by a federal equity court.

10. That under Equity Rules 21 and 25 allegations that are purely argumentative; matter that is impertinent, scandalous or libelous; and allegations concerning persons not connected with the suit, and matters that are not justiciable, may be properly objected to by motion to strike, and should be stricken from the pleadings, unless the court finds that the allegations are not as asserted.

11. That Act No. 23 of the Louisiana Legislature of 1934 represents a legitimate and constitutional exercise of the power of classification for purposes of license taxation.

12. That the classification is founded upon a reasonable distinction, is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy; and in exercising such power of classification the state does not deny equal protection of the laws.

13. That there is a marked and recognized difference between the business of selling advertisement in small country journals and that of selling advertisement in metropolitan newspapers; that the character of the businesses, the sources of revenue, and the fields of operation are entirely different, and these factors furnish a sufficient basis for classification for purposes of license taxation.

14. That a state does not deny the equal protection of the laws by granting exemption to certain classes or by adjusting its revenue laws and taxing system in such a way as to favor certain industries or form of industry.

Summary of Argument.

Part I. The jurisdiction of the federal courts under paragraph 14, Sec. 24, Judicial Code, can be exercised only when the suit is brought by citizens of the United States.

Where there is no diversity of citizenship, a federal court has no jurisdiction unless the suit arises under the Constitution or laws of the United States and there is a matter in controversy exceeding the value of $3,000.00.

Jurisdictional facts must be positively averred.

Where the dispute concerns the validity of a tax, the value of the tax alone establishes the jurisdictional amount.

The tax must equal the jurisdictional sum as to each complainant.

The facts averred must show a substantial federal question involved.

Part II. No federal equity court should interfere by injunction to prevent the collection of a tax levied by one of the sovereign states, unless it be to avoid great and irreparable injury, imminent or threatened. Where the tax is collectible only by suit, there is no possibility of great and irreparable injury.

Part III. Where the action in the federal court is one *in personam*, that court has no authority to enjoin the bringing of a personal action in a state court of concurrent jurisdiction.

A federal court of equity is without power to do indirectly that which it is prohibited by statute from doing directly.

Part IV. It is proper to proceed by motion to strike to have impertinent, irrelevant and libelous and non-justiciable matter eliminated from the pleadings.

Part V. The First Amendment operates against the Congress, not against the States. The Fourteenth Amendment did not extend to the States the restrictions imposed by the first ten amendments upon the federal government.

Corporations do not enjoy the privileges and immunities of citizens of the United States.

The liberty guaranteed by the Fourteenth Amendment is the liberty of natural, not of artificial persons.

A tax on the business of selling or charging for advertisements to be published in newspapers in no way affects liberty of speech or of the press as constitutionally understood.

The liberty of speech or of the press provisions of the Louisiana Constitution do not afford an exemption from taxation.

Part VI. The equal protection clause of the Federal Constitution does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification of businesses, trades, callings or occupations.

Where the difference between two allied businesses is so marked as to be recognized in the industry itself, it cannot be said that a state statute imposing a tax on one and not on the other, denies the equal protection of the laws.

Mere competition between two businesses is not enough to show that they must be burdened alike.

Part VII. The Constitution of Louisiana does not prohibit but, on the contrary, authorizes the Legislature to make such classifications as it may deem proper for purposes of occupational license taxes.

ARGUMENT.

Part I.

LACK OF JURISDICTION.

Subdivision (a).

JURISDICTION IN THIS MATTER DEPENDS UPON A MATTER IN CONTROVERSY EXCEEDING A SUM OR VALUE OF THREE THOUSAND DOLLARS.

This suit was brought in a district court of the United States to enjoin the collection of a tax levied under an act of the Legislature of Louisiana asserted to be unconstitutional under both the State and Federal Constitutions.

Jurisdiction is claimed on the ground that the suit is one of a civil nature arising under the Constitution of the United States, brought to redress the deprivation, under

color of a statute of the State, of certain rights, privileges and immunities secured to petitioners by the Constitution of the United States. (R. 10).

It is alleged in the bill that the tax imposed by the statute as to each of the petitioners, except three of them, would amount to more than Three Thousand Dollars PER ANNUM, exclusive of interest, costs, fines and penalties; that as to each of the excepted three the tax imposed by the statute, exclusive of interest and costs but inclusive of fines and penalties imposed by said act, would exceed the sum of Three Thousand Dollars PER ANNUM; that it is impossible to place a specific monetary value on the business which will be interfered with and on the damage which will be caused through the enforcement of the act, but that such value and damage will far exceed Three Thousand Dollars as to each of the plaintiffs. (R. 10).

Under this statement it was argued that the jurisdiction of the district court is under both paragraphs 1 and 14 of section 24 of the Judicial Code *(28 U. S. C. A., section 41, subdivisions 1 and 14,* see appendix).

It is obvious that the bill does not present a case falling within the fourteenth paragraph of *section 24 of the Judicial Code.*

First of all the complainants are not citizens of the United States. The assertion of privileges and immunities under the Constitution is injected in an attempt to make jurisdiction where none in fact exists.

> "A corporation does not possess the privileges and immunities of a citizen of the United States

within the meaning of the Constitution." *Liberty Warehouse Co. v. Burley Tobacco Growers, etc., 276 U. S. 71, 48 S. Ct. 291,* and cases therein cited.

"It is well settled that a corporation cannot claim the protection of the clause of the Fourteenth Amendment which secures the privileges and immunities of citizens of the United States against abridgment or impairment by the law of a state." *Selovar, Bates & Co. v. Walsh, 226 U. S. 112, 33 S. Ct. 69.*

"The liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law is the liberty of natural, not of artificial persons." *Western Turf Assn. v. Greenberg, 204 U. S. 359, 27 S. Ct. 384.*

Secondly, *paragraph 14, Sec. 24 J. C.*, has reference to suits at law or in equity authorized by Revised Statute Sec. 1979 *(8 U. S. C. A., Sec. 43)*, (See Appendix), and does not apply to cases involving property rights. The situation is not changed because it is wrongly asserted that the Fourteenth Amendment secures against state action that freedom of the press guaranteed by the First Amendment of the Constitution.

The language in the *Virginia Coupon* Cases, *Carter v. Greenhow, 114 U. S. 317, 5 S. Ct. 928,* and *Pleasants v. Greenhow, 114 U. S. 323, 5 S. Ct. 931,* are easily adaptable to the circumstances of the instant case, and demonstrate that jurisdiction does not exist under *paragraph 14 of section 24 of the Judicial Code.*

The complaint in those cases was that the State had passed an act impairing the obligation of contracts and

that the defendant under authority of such unconstitutional statute had refused to receive from the plaintiffs the coupons tendered in payment of their taxes and thereafter proceeded to levy upon and take their property for the purpose of collecting such taxes in money. The Court concluded that the complaint was not within the terms of *Section 1979 of the Revised Statutes* and pointed out that though the State was forbidden by the Constitution to pass a law impairing the obligations of contracts, if any such is nevertheless passed, it would be unconstitutional, null and void; that the mode in which Congress has legislated in aid of the rights secured by the pertinent clause of the Constitution

> "is, as is pointed out with clearness and fullness in the opinion of the Court in the Civil Rights Cases, - - - by providing for a review on writ of error to the judgments of the state courts, in cases where they have failed properly to give it effect, and by conferring jurisdiction upon the circuit courts - - - of all cases arising under the Constitution and laws of the United States, where the sum or value in dispute exceeds $500. Congress has provided no other remedy for the enforcement of this right."

See also the excellent discussion of this question by Learned Hand, District Judge, in *Marcus Brown Holding Co. v. Pollak, 272 Fed. 137*, in which he reviews the cases, distinguishes *Truax v. Raich, 239 U. S. 33, 36 S. Ct. 7*, and concludes as follows:

> "These cases, like the Civil Rights Cases, (109 U. S. 3-12, 3 S. Ct. 18) hold that the general right of property does not have its origin in the Constitution and that the Fourteenth Amendment is

> not constitutive of them. It is in this sense that we understand Subdivision 14 to use the word 'secure'. Were it not so, all matters arising 'under the Constitution,' as prescribed in Subdivision 1, would be justiciable under Subdivision 14, and the amount in controversy would never be a condition upon our jurisdiction, when a constitutional point was raised. This is certainly not the law."

If the complainants are deprived of property without due process, or are denied equal protection of the laws by the statute attacked, there is jurisdiction in the United States Courts only when the matter in controversy is within the jurisdictional amount.

Paraphrasing the language of Chief Justice Fuller in the case of *Holt v. Indiana Manufacturing Company, 176 U. S. 68, 20 S. Ct. 272:*

> If state legislation deprives of property without due process of law, or denies the equal protection of the laws, as asserted by counsel in respect of the statutes of Louisiana, remedies are found in the first paragraph of Section 24 of the Judicial Code, giving to the district courts jurisdiction of all cases arising under the Constitution and Laws of the United States; and in Section 237 of the Judicial Code, 28 U. S. C. A. 344, which gives a review on writ of error to the judgments of the State Courts whenever they sustain the validity of a State Statute or of an authority exercised under a State, alleged to be repugnant to the Constitution or laws of the United States.
>
> Treating this bill as setting up a case arising under the Constitution of the United States because of denial of equal protection, it is essential that there be a matter in controversy exceeding $3000.

Subdivision (b).

FACTS UPON WHICH JURISDICTION RESTS MUST BE POSITIVELY AVERRED, AND A BILL LACKING SUCH POSITIVE AVERMENTS MUST BE DISMISSED.

That a cause is presumed to be without the jurisdiction of a district court of the United States; that the facts upon which such jurisdiction rests must appear distinctly and positively; and that jurisdiction may not be inferred argumentatively, are, as said by Justice Harlan in *Thomas v. Board of Trustees of the Ohio State University, 195 U. S. 207, 25 S. Ct. 24*, propositions so firmly established that further discussion of them would be both useless and inappropriate.

The bill (paragraph XXI, R. 10) avers that the tax imposed by the Act under attack, as to each of the petitioners, except three, would amount to more than Three Thousand Dollars PER ANNUM, exclusive of interest, costs, fines and penalties. That as to each of the three the tax, exclusive of interest and costs, but inclusive of fines and penalties, would exceed the sum of Three Thousand Dollars PER ANNUM.

The statute does not levy an ANNUAL tax, but a QUARTERLY tax. Each quarter is separate and distinct. The only tax which, under any theory, could be said to be involved when the bill was filed is that which was to become due on October 1, 1934, for the short period from August 1, 1934, to September 30, 1934. There is no averment in the bill that the tax for that period would amount to more than Three Thousand Dollars, as to any of the petitioners.

The averment is that the tax would amount to more than Three Thousand Dollars over a period of a YEAR.

Future taxes which may be affected by the decision cannot be included in determining the value of the matter in dispute. *Holt v. Indiana Mfg. Co., 176 U. S. 68, 20 S. Ct. 272,* and cases therein cited.

See also:

Healy v. Ratta, 292 U. S. 263, 54 S. Ct. 700.

The bill admits that as to three of the petitioners the tax would NOT amount to more than Three Thousand Dollars, even in a YEAR, unless fines and penalties imposed by the Act were added to the tax (R. 10), which cannot be done.

The bill further avers (R. 10) that it is impossible to place a specific monetary value on the business with which the enforcement of the statute would interfere, but that as to each the damage caused through enforcement of the Act will far exceed the sum of Three Thousand Dollars.

Under the authority of *Healy v. Ratta (supra)*, this last general averment as to damage to the business must be ignored.

The bill, therefore, not only fails to positively aver facts showing an amount or value in controversy in excess of Three Thousand Dollars, but, on the contrary, NEGATIVES the existence of such facts.

There are no positive averments in the bill to overcome the presumption of lack of jurisdiction. The district

court was without authority or power on the face of the bill to issue the restraining order and the interlocutory injunction which interfered with appellant's enforcement of the statute and prohibited her from entering suit at the proper time, in the state court.

Subdivision (c).

THE VALUE OF THE DISPUTED TAX ALONE ESTABLISHES THE JURISDICTIONAL AMOUNT.

At the time of the filing of the bill no report or tax whatsoever was due. The first report and tax was not to become due until October 1, 1934, and interest on the first tax would not begin to run until the thirtieth day thereafter. By awaiting the due date of the first tax appellees could have avoided all interest and all damages by merely paying the tax.

> "The tax, payment of which is demanded or resisted, is the matter in controversy, since payment of it would avoid the penalty and end the dispute. See Ross v. Prentiss, 3 How. 771, 772, 11 L. Ed. 824. Whether and in what manner the penalty for nonpayment may be enforced in the event the tax is valid are but collateral and incidental to the determination whether payment may be exacted. Only when the suit is brought to restrain imposition of a penalty already accrued by reason of failure to comply with the statute or order assailed can the penalty be included as any part of the matter in controversy. See McNeil v. Southern Ry. Co., 202 U. S. 343, 26 S. Ct. 722, 50 L. Ed. 1142; Kansas City Southern Ry. Co. v. Ogden Levee Dist. (C. C. A.) 15 F. (2d) 637; compare Barry v. Edmunds, 116 U. S. 550, 6 S. Ct. 501, 29 L. Ed. 729." *Healy v. Ratta, 292 U. S. 263, 54 S. Ct. 700.*

Subdivision (d).

THE TAX IN CONTROVERSY MUST EQUAL THE JURISDICTIONAL SUM AS TO EACH COMPLAINANT.

As we have said, it is admitted in the bill that the tax, without the unaccrued penalties, would amount to less than Three Thousand Dollars PER ANNUM as to three of the complainants. The bill fails to show that the tax which was to become due October 1, 1934, would amount to more than Three Thousand Dollars as to ANY of the complainants. The averments of the bill, on the contrary, negative such fact.

It is well settled that in cases such as this the amount in controversy must equal the jurisdictional sum as to each complainant. *Scott, et al., v. Frazier, et al., 253 U. S. 243, 40 S. Ct. 503*, and cases therein cited. See also *Pinel v. Pinel, 240 U. S. 594, 36 S. Ct. 416; Cole v. Norborne Land Drainage District, 270 U. S. 45, 46 S. Ct. 196.*

See also *Di Giovanni v. Camden Fire Ins. Assn., 56 S. Ct. 1.*

Considering that on the face of the bill presented to the district judge it clearly appeared that the petitioners were not citizens of the United States, and that there was no positive averment of fact showing that the tax complained of amounted to Three Thousand Dollars as to any one of them, but, on the contrary, a positive admission that as to three of them the tax did not amount to Three Thousand Dollars, he should have declined to take jurisdiction of the case and should have entered no order whatsoever with respect thereto.

The three judges should also have declined jurisdiction. Appellant filed a motion to dismiss which pointed out that the bill lacked the necessary averments to show jurisdiction. Though this serious question of jurisdiction was called squarely to the attention of the statutory court, it gave no consideration to it in its written reasons other than to say: "The court is of the opinion that defendant's plea to the jurisdiction should be dismissed." (R. 94).

Following is a table made from the affidavits filed by complainants showing the amount of tax, not yet accrued at the time of the filing of the bill, to become due by each of them on October 1st, 1934, and payment of which would have avoided all penalties and ended all dispute. *(Healy v. Ratta).*

American Press Company, Inc.	$ 285.82
Capital City Press	735.06
Item Company, Ltd.	2,901.45
Journal Publishing Company, Inc.	712.74
Lafayette Advertiser-Gazette, Inc.	125.23
McCormick & Company, Inc.	313.05
News-Star-World Publishing Corporation	522.57
The Times-Picayune Publishing Company	5,219.97
Times Publishing Company, Ltd.	1,183.67

The evidence adduced by complainants establishes positively that the tax becoming due October 1, 1934, and payment of which would have avoided all penalties and ended dispute, amounted to less than Three Thousand Dollars as to all of them, but one. As to eight of these complainants, the Federal Courts are without a vestige of jurisdiction. Notwithstanding this apparently clear lack of jurisdiction the three judges enjoined defendant from attempting to collect the tax even by suit, instead of dis-

missing the bill for want of jurisdiction. As to the sole complainant whose tax would amount to more than $3000, there was no basis shown for the exercise of federal equity powers, as we shall show.

Subdivision (e).

WHERE DIVERSITY OF CITIZENSHIP DOES NOT EXIST, THERE MUST BE A FEDERAL QUESTION NOT IN MERE FORM, BUT IN SUBSTANCE, AND NOT IN MERE ASSERTION, BUT IN ESSENCE AND EFFECT.

> "To give jurisdiction to the federal courts where diversity of citizenship does not exist, there must be a federal question, not in mere form, but in substance, and not in mere assertion, but in essence and effect." *Cuyahoga River Power Co. v. Northern Ohio T. & L. Co., 252 U. S. 388, 40 S. Ct. 404.*

It is settled that not every mere allegation of a federal question will suffice to give jurisdiction. A real and not a mere formal federal question is essential to jurisdiction. *N. O. Waterworks Co. v. La., 185 U. S. 336, 22 S. Ct. 691.*

The averments of the bill present no real and substantial federal question.

Denial of equal protection of the laws is asserted because the State has selected the subjects or established a class for the purposes of the tax. The right of the State to do this cannot be questioned. See *State Board of Tax Com-*

missioners of Indiana v. Jackson, 283 U. S. 527, 51 S. Ct. 540, and cases therein cited and reviewed. And

> "Of still less merit is the suggestion that the statute abridges the rights and privileges of citizens; for a corporation cannot be deemed a citizen within the meaning of the clause of the Constitution of the United States, which protects the privileges and immunities of citizens of the United States against being abridged or impaired by the law of a state." *Western Turf Association v. Greenberg, 204 U. S. 359, 27 S. Ct. 384.*
>
> "The same observation may be made as to the contention that the statute deprives the defendant (plaintiffs) of its (their) liberty without due process of law; for the liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law is the liberty of natural, not artificial persons." *(Id.).*

What substance can there be to the suggestion that appellees are deprived of property without due process of law when the only action available to appellant is the institution of suit for a judgment, the execution of which "shall take place as provided by existing laws". *(Sec. 8 of the Act, appendix).* Whether suit is filed for the tax under *Section 8*, or whether the District Attorney sued to recover the penalty under *Section 9*, complainants would have full opportunity to present all defenses available to them, and to have the final judgment of the state court reviewed by the Supreme Court of the United States. Compare *N. O. Waterworks Co. v. State of La., supra.*

Equally devoid of merit is the suggestion that the statute abridges freedom of the press, as guaranteed by the

Federal Constitution. The first amendment restricts the powers of Congress, not those of the states.

It is obvious, however, that the statute neither curtails the right to freely utter and publish whatever the citizen may please, nor imposes any penalty as a result of such publication. Liberty of speech and of the press does not extend beyond this. The statute in fact deals solely with a business which has grown to Gargantuan proportions in recent years, the business of selling advertisements, and imposes upon that business a small contribution for the support of government. The business of uttering and publishing views and opinions, and of collecting and reporting occurrences and events of the day is in no wise affected. THE TAX IS LIMITED TO 2% OF THE GROSS RECEIPTS DERIVED FROM THE BUSINESS OF SELLING OR CHARGING FOR ADVERTISEMENTS.

Even if the tax extended to the publishing business, it would not be objectionable as impairing the liberty of speech and of the press.

> "Newspaper publishers may, without violating the constitutional provision in favor of the freedom of the press, be required to pay a license tax in respect to their business." *Cooley on Taxation, Vol. 4, Fourth Ed., Section 1707.*

We will discuss this question at greater length later.

The bill on its face presents no substantial federal question.

> " - - - affidavits filed in support of the application for a temporary injunction may not be considered in determining whether the complaint states facts sufficient to constitute ground for relief. Leo

v. Union Pac. Ry. Co. (C. C.) 17 F. 273; United States v. Marine Engineer's Ben. Assn. No. 38 (D. C.) 277 F. 830, 834; McGregor v. Great Northern R. Co., 42 N. D. 269, 280, 172 N. W. 841, 4 A. L. R. 1635. - - - The complaint contains much by way of argument, assertions as to questions of law together with inferences and conclusions of the pleader as to matters of fact. These are not deemed to be admitted by motion to dismiss. Equitable Life Assurance Society v. Brown, 213 U. S. 25, 43, 29 S. Ct. 404, 53 L. Ed. 682; Southern Ry. Co. v. King, 217 U. S. 524, 536, 30 S. Ct. 594, 54 L. Ed. 868; Pierce Oil Corp. v. Hope, 248 U. S. 498, 500, 39 S. Ct. 172, 63 L. Ed. 381. The state laws are presumed valid. - - - The burden is on the plaintiff by candid and direct allegations to set forth in its complaint facts sufficient plainly to show the asserted invalidity. Aetna Insurance Co. v. Hyde, 275 U. S. 440, 447, 48 S. Ct. 174, 72 L. Ed. 357, and cases there cited; N. O. Public Service v. New Orleans, 281 U. S. 682, 686, 50 S. Ct. 449, 74 L. Ed. 1115; Beaumont, S. L. & W. Ry. v. United States, 282 U. S. 74, 88, 51 S. Ct. 1, 75 L. Ed. 221." *Missouri Pac. R. Co. v. Norwood, 283 U. S. 249, 51 S. Ct. 458, 461.*

We respectfully submit that the serious question of jurisdiction presented in this case was not given proper consideration by the district judge and by the statutory court; and that there should be judgment by this court reversing the decree appealed from for lack of jurisdiction.

Part II.

IMPROPRIETY OF EQUITABLE INTERFERENCE.

Appellant objected *in limine* to the equity jurisdiction of the district court by moving to dismiss for lack of facts in the bill to constitute a valid cause of action in equity. The motion was denied without comment.

The statute assailed as unconstitutional furnishes no means of action to the Supervisor of Public Accounts, charged with its enforcement, other than the institution of a suit in a court of competent jurisdiction, where every objection of law and fact would be open to the defendant in such suit.

The statute does not provide for a lien against property, nor for summary seizure thereof, nor for interference with the business by injunction, or otherwise; and no execution is permitted except such as would result from any other final judgment of the State Court.

By frequent repetition, this Court has consecrated the doctrine that no federal equity court will interfere with the enforcement of a law of one of the Sovereign States merely because of its asserted illegality or unconstitutionality. This is particularly true when an injunction is sought to prevent the collection of a tax. It is only to avoid GREAT and IRREPARABLE injury, imminent or threatened, that a federal court of equity will interfere.

In the *Massachusetts Daylight Saving Acts* case you characterized the foregoing rule as important, and said:

> "We desire to emphasize that no injunction ought to issue against officers of a State clothed with authority to enforce the law in question, unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury.
>
> - - -
>
> "Courts sometimes say that there is no jurisdiction in equity when they mean only that equity ought not to give the relief asked. In a strict sense the Court in this case had jurisdiction. It had power to grant an injunction, and if it had granted

> one its decree, although wrong, would not have been void. But upon the merits we think it too plain to need argument that to grant an injunction upon the allegations of this bill would be to fly in the face of the rule which, as we have said, we think should be very strictly observed." *Massachusetts State Grange v. Benton, 272 U. S. 525, 47 S. Ct. 189.*

In the instant case the allegations of the bill are insufficient to show jurisdiction in equity. To grant an injunction thereunder is indeed to fly in the face of the rule.

No GREAT or IRREPARABLE injury is shown by the bill to be imminent or to have been threatened or to be POSSIBLE. No GREAT or IRREPARABLE injury can be asserted when the only possible complaint is that a law suit in the State Court may result unfavorably to the complainants.

In *Northport P. & L. Co. v. Hartley, 283 U. S. 568, 51 S. Ct. 581,* a bill in equity was brought to enjoin State Officers from bringing or causing to be brought a suit for enforcing a statute of the State of Washington on allegations that the same violated the commerce and contract clauses of the Federal Constitution, the Fourteenth Amendment, and the Treaty between the United States and Great Britain. The bill was dismissed by a district court of three Judges. In affirming the dismissal this Court said:

> "It is an odd ground for an injunction against a suit that the suit may turn out against the party sued. If the action is based upon an unconstitutional law and if the trial court upholds it, still THE APPELLANT CAN PROTECT ITS RIGHTS AS FULLY IN THE STATE COURTS AS ELSEWHERE. As it is put by Mr. Justice Moody speak-

ing for an unanimous Court, 'it is safe to say that no case can be found where this court has deliberately approved the issuance of an injunction against the enforcement of an ordinance resting on state authority, merely because it was illegal or unconstitutional, unless further circumstances were shown which brought the case within some clear ground of equity jurisdiction.' Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U. S. 276, 283, 29 S. Ct. 426, 429, 53 L. Ed. 796. Cavanaugh v. Looney, 248 U. S. 453, 456, 39 S. Ct. 142, 63 L. Ed. 354."

In *Keokuk & Hamilton Bridge Co. v. Salm, 258 U. S. 122, 42 S. Ct. 207*, affirming a decree of the District Court dismissing a bill of complaint to enjoin the collection of a tax, this Court said:

"The Illinois statutes relating to the assessment and taxation of real estate - - - **under which taxes levied against a bridge company are collected by judicial proceedings in which the taxpayer can present any defense, gives ample protection to the taxpayer, so that it is not entitled to injunction to restrain the collection of the tax, either on the ground of preventing a sale for illegal tax creating a cloud upon title, or of preventing a multiplicity of suits, or other irreparable injury.**"

In *St. Louis, San Francisco Ry. Co. v. Middlekamp, 256 U. S. 226, 41 S. Ct. 489*, it was held that a railroad company could not restrain the collection of a franchise tax on the ground that the laws of Missouri imposing the tax made no provision for a hearing, where the tax was collectible only by suit in which it was to be supposed any question of law apparent on the face of the record would be open. The bill to restrain the collection of the tax was

denied by the lower court and the denial was affirmed here.

In the recent case of *Matthews v. Rodgers, 284 U. S. 521, 52 S. Ct. 217, 219*, this Court said:

> "Section 16 of the Judiciary Act of 1789, 1 Stat. 82, perpetuated without material change as Rev. Stat. § 723, Jud. Code § 267 (28 U. S. C. § 384, 28 USCA § 384), declares that suits in equity shall not be sustained in the courts of the United States 'in any case where a plain, adequate, and complete remedy may be had at law.' The effect of this section, which was but declaratory of the rule in equity, established long before its adoption, is to emphasize the rule and to forbid in terms recourse to the extraordinary remedies of equity where the right asserted may be fully protected at law. See Deweese v. Reinhard, 165 U. S. 386, 389, 17 S. Ct. 340, 41 L. Ed. 757; New York Guaranty Co. v. Memphis Water Co., 107 U. S. 205, 214, 2 S. Ct. 279, 27 L. Ed. 484.
>
> "The reason for this guiding principle is of peculiar force in cases where the suit, like the present one, is brought to enjoin the collection of a state tax in courts of a different, though paramount sovereignty. The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it. Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and complete, the aggrieved party

> **is left to that remedy in the State Courts, from which the cause may be brought to this Court for review if any Federal question be involved,** Jud. Code § 237 (28 USCA § 344), or to his suit at law in the federal courts if the essential elements of federal jurisdiction are present. See Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U. S. 276, 29 S. Ct. 426, 53 L. Ed. 796; Shelton v. Platt, 139 U. S. 591, 11 S. Ct. 646, 35 L. Ed. 273; Dows v. Chicago, 11 Wall. 108, 110, 112, 20 L. Ed. 65."

Section 5 of the Act authorizes payments to be refunded that may have been made when not due and collectible, out of any funds on hand collected under the Act and not remitted to the State Treasurer according to law. *Section 11* of the Act requires the Supervisor to make remittance to the State Treasurer not later than the 30th day after the last day of the preceding quarter of all taxes, interest and penalties collected during said quarter.

The Supreme Court of the State has been deprived of an opportunity to construe these two sections by the restraining order and the injunctions issued herein. The sections may be fairly construed to mean that where a tax is paid under protest no remittance is to be made to the State Treasurer until judicial determination of liability.

In any event the only means available for enforcing any of the provisions of the act is by means of judicial proceedings where all available defenses could be presented and all federal questions disposed of in due course of law.

The pretense that equitable relief is necessary in order to avoid a multiplicity of suits, finds no support either in fact or under settled jurisprudence.

To give relief in equity against multiplicity of suits complainant must have prevailed in at least one law action. *N. Y. Life Ins. Co. v. Marshall, 23 F. (2d) 225 (C. C. A. 5th C.).* Certiorari denied *277 U. S. 587, 48 S. Ct. 434.*

Even if a suit had been filed equity would not interfere except to prevent continued and vexatious litigation between the same parties. See *Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U. S. 276, 29 S. Ct. 426.*

Had appellant not been prevented from filing suit by a restraining order, and subsequently by injunction, the issue herein would have been settled by one suit in a court of competent jurisdiction in the state, which suit would have long since been settled by final judgment of the Supreme Court of Louisiana. (See affidavit, R. 67).

The bill of complaint does not show that appellant was unwilling to abide the result of a trial of one suit, or that more than one suit would be necessary. Compare *DiGiovanni v. Camden Fire Ins. Ass'n., 56 S. Ct. at p. 5.*

In the last cited case, decided by this Court on November 11, 1935, the rule, often pronounced, was again repeated, that courts of equity, in the exercise of their discretionary powers, should maintain a scrupulous regard for the rightful independence of the state governments and withhold a remedy infringing that independence, which might otherwise be given, where the grounds of complaint are slight or inconsequential.

As to the tax accruing on January 1, 1935, under the Act, even if the question of the legality of the tax

accruing October 1, 1934, had not then been finally decided, there was available prior to January 1, 1935, a statute of the state which became effective December 6, 1934, which specifically provides for a complete and adequate remedy for the prompt recovery by every taxpayer of any illegal tax paid by him *(Act 16, Second Extraordinary Session of 1934*, Louisiana Legislature. See Appendix).

Part III.

SECTIONS 265 AND 266 OF THE JUDICIAL CODE.

Judicial Code, Sec. 265:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." *(28 USCA, 379).*

Judicial Code, Sec. 266, regulating the issuance of injunctions restraining the enforcement of a state statute, contains the following proviso:

> "It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State." *(28 USCA, 380).*

In return to the rule for a temporary injunction appellant specifically raised the question that no injunc-

tion should issue to preclude her from bringing an action *in personam* against the complainants in any court of concurrent jurisdiction, and that no injunction should issue which would deprive her or the State of Louisiana of any rights under *Sec. 266 of the Judicial Code.* (R. 60-61).

The equity courts of the United States are forbidden to issue the process of injunction to interfere with the prosecution of an action *in personam* in a state court of concurrent jurisdiction.

As said in *Kline v. Burke Construction Co., 260 U. S. 226, 43 S. Ct. 79:* "The rule (therefore) has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded." This declaration, made by Justice Sutherland for an unanimous court, is supported by a long line of authority, and was recently affirmed in *Monamotor Oil Co. v. Johnson, 229 U. S. 86, 54 S. Ct. 575.*

In the last cited case: "The state treasurer, having confirmed the facts by an audit of the company's books, caused the appellant and certain of its officers to be indicted for making a false return, procured the Attorney General to bring a civil action against the appellant by attachment to recover the unpaid tax on gasoline imported and used within the state, and notified the appellant that he had revoked its license as a distributor. The individual defendants pleaded guilty and were fined, and the indictment was dismissed, as to the company. The civil suit was pending when the present bill was filed, asserting the invalidity of the law, and praying that the state treasurer and other officials be enjoined from interfering with the conduct of

appellant's business as a distributor, from collecting the taxes imposed by the statutes, and from prosecuting the civil action in the state court."

The district court dismissed the bill pointing out that section 265 of the Judicial Code forbids the granting of the relief prayed for. The judgment was affirmed here.

The fact that in the instant case the bill was filed in the district court of the United States before resort was had (or could be had) to a court of the State, does not alter the rule. In *Grubb v. Public Utilities Commissioner of Ohio, 281 U. S. 470, 50 S. Ct.*, this Court said at *page 477:*

> "It next is said that the suit in the federal court was begun before resort was had to the state court, and therefore that the jurisdiction of the federal court was exclusive and precluded action in the state court. In this the appellant is invoking a rule which is applicable to suits dealing with specific property and involving actual or potential control over the same, where necessarily the court (whether federal or state) first obtaining jurisdiction of the res must hold it to the exclusion of another. Here the litigation was not of that class, but was of such a nature that it could proceed in both courts, in virtue of their concurrent jurisdiction, until there was a final judgment in one, Kline v. Burke Construction Co., 250 U. S. 226, 43 S. Ct. 79, 67 L. Ed. 226, 24 A. L. R. 1077, when that judgment would become conclusive in the other as res judicata. Chicago, Rock Island & Pac. Ry. Co. v. Schendel, 270 U. S. 611, 616, 46 S. Ct. 420, 70 L. Ed. 757, 53 A. L. R. 1265; Mutual Life Insurance Co. v. Harris, 97 U. S. 331, 336, 24 L. Ed. 959."

Had appellant not been restrained and enjoined from bringing an action *in personam* in a state court for

a determination of the tax liability, and had she brought such action when the tax became due under the statute, no court of the United States could have restrained or enjoined such proceedings, under *Section 265 of the Judicial Code;* and had she not been restrained and temporarily enjoined from suing in the courts of the State, she could have brought proceedings in the state court which would have stayed all proceedings in the federal court, under *Section 266 of the Judicial Code.*

Because of an abuse of power, we are now confronted with a situation where an officer of the State, charged with the duty of collecting a tax, and vested with power to proceed only by a suit *in personam* in the courts of the State, has been restrained and enjoined by a federal equity court to so proceed, with a result equivalent to a judicial repeal of *sections 265 and 266 of the Judicial Code.*

A court of equity cannot be permitted to circumvent the law, nor to do indirectly what it cannot do directly, as was done in this case by restraining the bringing of an action *in personam* in the state courts prior to the time when it was possible to bring such action.

The error committed by the district court serves to emphasize the propriety of the rule approved in *Northport P. & L. Co. v. Hartley; Keokuk & Hamilton Bridge Co. v. Salm; St. Louis, San Francisco Ry. Co. v. Middlekamp,* and in *Matthews v. Rodgers,* all cited *supra.*

Whether the error be regarded as jurisdictional or merely as an abuse of equity power, the decree of injunction should be reversed and the bill dismissed.

Part. IV.

ON THE MOTION TO STRIKE.

Under the old practice the remedy to strike out impertinent and scandalous matter was by exception. Under *Equity Rule 21* exceptions are no longer allowed, but the matter may, on motion, be stricken by order of Court. *Williams v. Pope, 215 F. 1000.* See *Note 541, Equity Rules, 28 U. S. C. A., p. 202.*

Paragraph VIII of the bill of complaint violates *Equity Rules 21 and 25.* The matter therein contained is purely argumentative; there is no statement of ultimate fact; it is totally irrelevant. There is no question of rates involved here.

Paragraph XI of the bill of complaint not only violates *Equity Rules 21 and 25,* but presents no justiciable matter. The paragraph contains conclusions which are impertinent, scandalous and libelous, and concern persons not connected with this suit.

> "Scandal in a pleading consists of any unnecessary allegation bearing cruelly on the moral character of an individual, or stating anything contrary to good manners or anything unbecoming in dignity of the court to hear. Impertinence consists of any allegation that is irrelevant to the material issues made or tendered." *Kelly v. Boettcher, 85 F. 55, 29 C. C. A. 14.*

> "The most objectionable form of impertinence is that which consists of scandalous and libelous matter. This matter is more particularly obnoxious where the harmful allegations concern persons not connected with the suit." *Polk v. Mutual Reserve Fund Life Ass'n., 128 F. 524.*

Paragraph XI of the bill (R. 5) consists entirely of a libel against the majority of the members of the Legislature of Louisiana, who are not parties to these proceedings, by ascribing to them improper and illegel motives in the enactment of the statute under consideration.

It presents no justiciable matter. Courts cannot inquire into the motives of the law-enacting bodies or into the wisdom of the legislation.

> "No principle of our constitutional law is more firmly established than that this Court may not, in passing upon the validity of a statute, inquire into the motives of Congress (citing authorities), nor may it pass upon the necessity for the exercise of a power possessed, since the possible abuse of a power is not an argument against its existence." *Hamilton v. Kentucky Distilleries, 251 U. S. 146, 40 S. Ct. 106.*

In *Spencer v. Merchant, 125 U. S. 355, 8 S. Ct. 926,* quoting the words of Chief Justice Chase, condensing what had been said long before by Chief Justice Marshall, this Court said:

> "The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected."

This same quotation is repeated in *McCray v. United States, 195 U. S. 27, 24 S. Ct. at p. 777.*

In the last mentioned case Justice White, as the organ of the Court, pointed out:

> "Whilst, as a result of our written constitution, it is axiomatic that the judicial department of the government is charged with the solemn duty of enforcing the Constitution, and therefore, in cases properly presented, of determining whether a given manifestation of authority has exceeded the power conferred by that instrument, no instance is afforded from the foundation of the government where an act which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust. To announce such a principle would amount to declaring that, in our constitutional system, the judiciary was not only charged with the duty of upholding the Constitution, but also with the responsibility of correcting every possible abuse arising from the exercise by the other departments of their conceded authority. So to hold would be to overthrow the entire distinction between the legislative, judicial, and executive departments of the government, upon which our system is founded, and would be a mere act of judicial usurpation."

See also the *Boulder Canyon* Case between the States of Arizona and California, *283 U. S. 423, 51 S. Ct. 522.* The bill of complaint contained an allegation that the "recital in said act that the purpose thereof is the improvement of navigation - - - is a mere subterfuge and false pretense". The Court said: "Into the motives which induced members of Congress to enact the Boulder Canyon Project Act, this Court may not inquire", citing *McCray v. United States (supra)* and other cases.

And as said in *State Board of Tax Com'rs. of Indiana v. Jackson (283 U. S. 527, 51 S. Ct. at p. 343)*:

> "It is not the function of this Court in cases like the present to consider the propriety or justice of the tax, to seek for the motives, or to criticize the public policy which prompted the adoption of the legislation."

Lastly, in *Magnano Co. v. Hamilton, 292 U. S. 40, 54 S. Ct. at p. 601*, this Court said:

> "Collateral purposes or motives of a Legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry (citing McCray v. United States, supra). Nor may a tax within the lawful power of a state be judicially stricken down under the due process clause simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses."

Assuming that the dominant political party in Louisiana persuaded the Legislature that a tax on the business of selling advertisements furnished an unexplored source of revenue to alleviate the necessities of the fisc, neither this court, nor any other court, can inquire into these circumstances.

Assuming that the dominant political party in Louisiana, through the distribution of patronage, or the withholding thereof, or by other means, induced a majority of the members of the Legislature to enact the statute under consideration, such practice is not peculiar to state action. Whether the federal congress or a state legislature has responded to pressure from a dominant political

party in the enactment of laws, presents no matter open to judicial inquiry.

The motion to strike the irrelevant paragraph VIII and the libelous paragraph IX of the bill was seriously argued below and is seriously urged here, as alternative pleas if the bill be not dismissed for lack of jurisdiction or of equity. The lower court treated this motion as lightly as it treated the questions of jurisdiction and impropriety of equitable interference, and made no comment in its written reasons as to why the motion was denied.

Part V.

FREEDOM OF THE PRESS.

The first amendment to the Federal Constitution imposes no restriction upon the states with reference to abridging the freedom of speech or of the press. The prohibition is directed only against Congress.

The pertinent language of the amendment is:

> "Congress shall make no law - - - abridging the freedom of speech or of the press; - - -."

Complainants contend that by effect of the fourteenth amendment, legislatures of the states are prohibited from passing laws infringing the freedom of the press. This theory finds no support in the jurisprudence of this court. From *Cooley's Constitutional Limitations, 8th Ed. (Carrington) Vol. 1, p. 67, note,* we quote the following:

> "The adoption of the fourteenth amendment has not extended to the several States of the Union the restrictions imposed by the first ten amend-

ments to the Constitution of the United States upon the Federal Government. See Maxwell v. Dow, 176 U. S. 581, 44 L. Ed. 597, 20 Sup. Ct. Rep. 448; Brown v. New Jersey, 175 U. S. 172, 44 L. Ed. 119, 20 Sup. Ct. Rep. 77; Loeper v. Texas, 139 U. S. 462, 35 L. Ed. 225, 11 Sup. Ct. Rep. 577; Caldwell v. Texas, 137 U. S. 692, 11 Sup. Ct. Rep. 224; Re Converse, 137 U. S. 624, 34 L. Ed. 796, 11 Sup. Ct. Rep. 191; Missouri v. Lewis 101 U. S. 22; United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; Slaughter House Cases, 16 Wall. 36, 21 L. Ed. 394."

The effect of the second clause of the Fourteenth Amendment was to protect from the hostile legislation of the states, the privileges and immunities of CITIZENS OF THE UNITED STATES as distinguished from the privileges and immunities of Citizens of the states. To establish a clear and comprehensive definition of this citizenship, the first clause of the Fourteenth Amendment declares that "all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States." See *Slaughter House Cases, 16 Wall. 36, 83 U. S. 395.*

The liberty guaranteed by the fourteenth amendment against deprivation without due process of law is the liberty of NATURAL not of artificial persons. See *Western Turf Assn. v. Greenberg, 204 U. S. 359, 27 S. Ct. 384.* The appellees are corporations. They do not possess the privileges and immunities of citizens of the United States within the meaning of the Constitution. See *Liberty Warehouse Co. v. Burley Tobacco Growers, (supra).*

A corporation cannot claim the protection of the clause of the fourteenth amendment which secures the privileges

and immunities of citizens of the United States against abridgment or impairment by the law of a state. See *Selovar, Bates & Co. v. Walsh, 226 U. S. 112, 33 S. Ct. 69.*

There is nothing contrary to this in *Near v. Minnesota, 283 U. S. 697, 51 S. Ct. 625; Gitlow v. N. Y., 268 U. S. 652, 45 S. Ct. 625; Whitney v. California, 274 U. S. 357, 47 S. Ct. 641; Fiske v. Kansas, 274 U. S. 380, 47 S. Ct. 655; Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55,* upon which appellees relied below as in each of these cases the complainant was a citizen of the United States and not an artificial person.

Nor will it do to say that because the stockholders of these corporations are citizens of the United States the corporations must be considered as such. Compare *Bank of Augusta v. Earle, 13 Pet. 519, 10 L. Ed. 274.*

Furthermore, as pointed out in *Near v. Minnesota,* the chief purpose of the constitutional protection of liberty of the press is to prevent previous restraints upon publications.

Nowhere has it ever been held that a person or corporation engaged in the publishing business is exempt from taxation. The following authorities are to the contrary:

In re Jaeger, 29 South Carolina, 438, 7 S. E. 605, It was contended that to require a license for conducting the business of publishing a daily newspaper was in violation of the Constitution of South Carolina in regards to liberty of the press. The Court answered:

> "But we cannot see that a tax on the business of publishing a newspaper is any more an abridgement

of the liberty of the press than a tax on the office, type, and other material used in the business."

City of Norfolk v. Norfolk Landmark Publishing Co., 95 Va. 564, 28 S. E. 959. Objection was made to a license tax imposed on every person, firm or corporation engaged in the publication of a newspaper. The Court said:

> "A tax imposed upon the business of publishing a newspaper is not an abridgement of the freedom of the press. The guarantees of the Constitution and bill of rights in favor of the freedom of the press, freedom of speech, and personal liberty, were never intended to restrict the right of taxation for the support of the government. If these guarantees did restrict the power of taxation, the government would soon be insolvent, and powerless to furnish the protection claimed."

In the latter case the court referred to the note in the *Federalist, p. 632,* containing Hamilton's declaration:

> "I know not by what logic it could be maintained, that the declarations in the State Constitutions, in favor of the freedom of the press, would be a constitutional impediment to the imposition of duties upon publications by the State legislatures."

Hamilton also said:

> "We know that newspapers are taxed in Great Britain, and yet it is notorious that the press nowhere enjoys greater liberty than in that country."

If freedom of the press was said to imply freedom from taxation, the Income Tax law of the United States, which takes a part of every penny collected as income from the business of publishing a newspaper, would be clearly unconstitutional as Congress, by the First Amendment to

the Constitution, is distinctly forbidden to make a law abridging the freedom of the press.

To avoid insurmountable objections, appellees will concede the validity of the Federal income tax, of *ad valorem* taxes, and of corporation franchise taxes. They will object to the tax under consideration solely because it is an occupational license tax. So were the license taxes in the *Jaeger* and *Norfolk* cases; and they were occupational license taxes levied directly upon the business of publishing newspapers.

The tax levied by the Louisiana Legislature is not an occupational license tax on the business of publishing newspapers. The Legislature could have levied such a tax, but it did not do so. It imposed the tax on the business "of selling, or making any charge for, advertising or for advertisements".

It is not essential to liberty of speech and freedom of the press, as constitutionally understood, that profit be derived from the exercise of these rights. Nor was it ever contemplated that the constitutional guarantee should extend to charging for and selling advertising.

In fact, the constitutional guarantee is limited to the right of the citizen to speak and publish his views, subject to punishment for the abuse of that privilege. Liberty of speech and of the press is not an absolute right. *Near v. Minnesota, supra.*

Even if the appellees were citizens of the United States, extended argument would seem to be unnecessary to demonstrate that there is no substance to the complaint

that the statute under consideration infringes upon the freedom of the press as guaranteed by the Federal Constitution.

Appellees rely also upon *Section 3 of Article 1 of the Constitution of Louisiana*, which provides:

> "No law shall ever be passed to curtail or restrain the liberty of speech or of the press; any person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

The highest court of Louisiana has already construed that provision as not affording an exemption from taxation. *City of New Orleans v. Crescent Newspaper, 14 La. Ann. 804.* This construction is binding here. *Guaranty Trust Co. of N. Y. v. Blodgett, 287 U. S. 509, 53 S. Ct. 244.*

If there is any burden placed upon liberty of speech and freedom of the press, it is imposed by the appellee corporations who are profiting by engaging in the business of selling or charging for the use of their columns for the expression of views or the presentation of the merit of commercial products.

The state statute does not censure or restrict the free expression of opinions. It merely requires of those who engage in the profitable business of making others pay for the expression of their views, or for advertising their business, a small contribution for the support of government.

There is neither substance, nor federal question, in the complaint that the statute under consideration abridges liberty of speech or the freedom of the press.

Part VI.

DENIAL OF EQUAL PROTECTION.

The bill of complaint does not set forth specifically in what manner the statute deprives the complainants of the equal protection of the laws. (R. 6).

From the general averments of the bill it appears that the assertion rests on the classification adopted by the statute.

The lower court concluded that the statute does not represent a legitimate exercise of the power of classification; that the classification adopted is purely arbitrary and thus denies the equal protection of the laws to those against whom it discriminates; that the fact that there is a difference between the urban and metropolitan press is not sufficient to meet the requirement that classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

The district court cited as its sole authority, *Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32, 48 S. Ct. 423*, and *Stewart Dry Goods Co. v. Lewis, et al., 55 S. Ct. 525.*

The cited cases are essentially different from the case at bar and the distinction is palpable.

In the first case the majority of this court, under a division of five and four, held that a tax of Kentucky on the necessary privilege of recording mortgages, imposed

only when the indebtedness did not mature within five years, was an arbitrary classification which denied equal protection. The fundamental fault found with the statute was that a circumstance which affected only taxable values had been made the basis of a classification under which one was compelled to pay a tax for the enjoyment of a necessary privilege which was furnished to another as a pure gratuity. The predicate of the decision is found in this sentence:

> "The difference relied upon is no more substantial, as the sole basis for the present classification, than a difference in value between two similar pieces of land would be if invoked as the sole basis for a like classification in respect of such property."

In the instant case the classification is based upon a long recognized difference in the nature and type of the business, in organization and management, in the source of the revenue, in power and in opportunity, and in the field of operation.

The dissimilarity between the second case and the instant case is still more manifest and apparent. In that case the majority of this court, under a division of six and three, held another statute of Kentucky, imposing a graduated gross sales tax, to be invalid and used the same analogy as in the other case. It was found that the tax in substance and legal effect was not an occupation tax, or one which imposed an excise upon the conduct of retail business, but was a sales tax or an excise on the act of making a sale, and as such that the operation of the statute was as unjustifiably unequal, whimsical and arbitrary as would be a tax on tangible personal property, say cattle, stepped up in

rate on each additional animal owned by the taxpayer, or a tax on land similarly graduated according to the number of parcels owned.

The tax in the instant case is not a sales tax. It is an occupational license, imposed on the privilege of engaging in the business described in the statute. It is not imposed on each sale made in said business, nor does it increase according to the number of sales, but it is fixed at an invariable percentage of the gross receipts of the business. The gross receipts are used merely as a measure of the tax so that all similarly situated, both as to the character of the business and the amount of gross receipts, pay exactly the same tax.

The court below found no fault in the method of determining the quantum of the tax, but it held the classification arbitrary because of the selection of the subjects of taxation made by the Louisiana Legislature. Because the state in taxing metropolitan newspapers did not include the small country journals, and notwithstanding the differences disclosed by the record between the two businesses, the lower court held that if one newspaper was taxed for the privilege of selling advertisements, all newspapers must be so taxed. Neither of the cases relied on by the lower court goes that far. On the contrary, in the *Louisville Gas & Electric Co.* case the right of a state to make exemptions was recognized; and in the *Stewart Dry Goods Co.* case the principle was affirmed that even a small difference in the method of conducting business may be availed of by government in imposing different taxes.

The lower court might as well have held the statute invalid on the ground that the tax is not imposed upon every conceivable type of agency furnishing means for advertising. It might have concluded that the statute was rendered unconstitutional by the exclusion of those engaged in the business of selling advertisements to be printed on billboards, and on cards to be placed in street cars and buses, and on banners to be flown from the tails of aeroplanes; or of advertisements to be flashed on electrically lighted signs, or otherwise exhibited. Thus, with the same effect, but more clearly, could the lower court have denied to the state all right of selecting subjects for taxation.

Long ago this court announced the principle, from which it has never departed, that the restriction which requires that the essential power of taxation in the states shall not be so exercised as to deny the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings or occupations. That a discrimination in favor of a certain class does not make a statute arbitrary if the discrimination is founded upon a reasonable distinction, or if any state of facts reasonably can be conceived to sustain it, and that such differences need not be great, is, as said by Justice Roberts, made abundantly clear by the past decisions of this court. See *State Board of Tax Commissioners of Indiana v. Jackson, 283 U. S. 527, 51 S. Ct. at p. 543.*

The findings and conclusions of the lower court do not meet the requirements of *Equity Rule 70½*, in that the

findings of fact are not complete, and recourse must be had to the conclusions of law to point out certain facts which are only referred to in the course of explanation, reasoning, or opinion.

The lower court limited its separate findings of fact to the verified pleadings and affidavits filed by the appellees. It made no reference whatsoever to a single, solitary fact established by the pleadings or affidavits filed by appellant. But in the course of its conclusions of law, the lower court recognized that there were differences between the small country journals and the metropolitan newspapers, but concluded:

> "The fact that there is a difference between the urban and metropolitan press is not sufficient to meet the requirement that the classification always 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike' ".

The lower court points to no reason for its conclusion that those similarly circumstanced are not similarly treated.

Nor does the paraphrase attempted by the lower court from the *Louisville Gas* case help to support the conclusion. The state can lawfully tax the country journals and exempt the metropolitan press, if there be sufficient difference between them to constitute two classes, and if the state desires to promote the metropolitan press and discourage the small country journal. Compare *Am. Sugar Refining Co. v. La., 179 U. S. 89, 21 S. Ct. 43; Broad River Power Co. v. Query, 288 U. S. 178, 535 S. Ct. 326.*

This reversal of the situation does not lead, as the lower court concludes, to an inequality readily conceded, nor make constitutional infirmity more strikingly apparent. The paraphrase fails because there is no inequality and no constitutional infirmity. Its failure demonstrates the inapplicability of the *Louisville Gas* case to the instant case. The tax in the instant case is not imposed upon a necessary privilege, but upon the privilege of engaging in a business in which one is free to engage in or not as he chooses.

The court's admission that there are differences between two businesses is inconsistent with its conclusion that discriminations are made between persons similarly circumstanced.

There is no innovation in the classification adopted by the Legislature of Louisiana. It was long theretofore an established and recognized fact that the small country journal, with a circulation of less than 20,000 per week, could not be compared, hence is not in the same class, as the city newspaper with its large circulation and more extensive field of operation.

The affidavits in this record demonstrate the sharp distinction that exists between the business of the newspapers which fall within the statute and those which are without. The character of the business, the source of revenue, the field of operation are entirely different, with a difference so great that in 1909 one author pointed out that it was obviously absurd to try to compare them.

In his work "*The American Newspaper*" (published in 1909), James Edward Rogers, in the course of his comparison of country papers and city papers, makes this remark (p. 35):

> "Obviously it is absurd to assert that a small four-paged country journal with a subscription list of about EIGHTEEN THOUSAND in any way compares with the huge twenty-four paged daily of a large city with over one hundred and fifty thousand subscribers. There is no comparison. - - - With the growth of cities the field of the city paper has grown, and with the increase of communication and travel the city paper has begun to oust the little four-paged conservative journal of the country. - - - The City paper to-day, for instance, covers an area of about two hundred miles. It supplies news not only to the inhabitants of its own city and the residents of suburbs, but it is delivered at all points of the country within a radius of two hundred miles before ten o'clock of the morning it is issued."

The affidavits filed on behalf of appellant show that the classification as adopted actually operates as a classification between the small country journal and the huge city newspaper.

Under these circumstances, how can it be said that the classification does not rest upon a reasonable basis and that it is essentially arbitrary?

The rule is, that "one assailing a legislative classification as violative of equal protection clause *(Const. U. S. Amend. 14)* has burden of showing that it does not rest on a reasonable basis, but is essentially arbitrary." *Whitney v. People of State of California, 274 U. S. 357, 47 S. Ct. 641; Metropolitan Casualty Ins. Co. v. Brownell, 55 S. Ct. 538.*

No such showing has been made in this case. On the contrary it has been shown that the newspapers not included in the classification of the statute are in fact operating an entirely different type of business with distinctions which are recognized in the trade, and which were followed in determining the class to be taxed. Borrowing the language of Justice McKenna:

> "If the action of government have such a basis it cannot be declared to be so palpably arbitrary as to be repugnant to the 14th Amendment. This is the test of its validity, as we have so many times said. We need not cite the cases. It is enough to say that we have tried, so far as that Amendment is concerned, to declare in words, and the cases illustrate by examples, the wide range which legislation has in classifying its objects. To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, yet be free from judicial interference. The problems of government are practical ones and may justify, if they do not require, rough accommodations,—illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not always discernible; the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void under the 14th Amendment; and such judgment cannot be pronounced of the ordinance in controversy. Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. Ed. 350, 32 Sup. Ct. Rep. 192." *Metropolis Theater Co. v. Chicago, 228 U. S. 61, 33 S. Ct. 441.*

A state does not deny the equal protection of the laws because it recognizes the distinction between a small country journal, appearing weekly or semi-weekly, with a

circulation limited both as to area and number, and carrying local advertisements only, and the metropolitan daily with an extensive circulation and carrying about one-third news and two-thirds advertisements. Compare *Broad River Power Co. v. Query, 288 U. S. 178, 53 S. Ct. 326.*

The state has a right to determine when the character of the business is such as to be called upon to contribute a share to the burdens of government, and it cannot be opposed because other allied businesses are not taxed.

In *Citizens' Telephone Co. v. Fuller, 229 U. S. 322, 33 S. Ct. 833*, the plaintiff asserted that it was denied equal protection of the law under a statute of the State of Michigan which levied an *ad valorem* tax on telephone companies, but exempted those companies whose gross receipts within the State did not exceed $500. The plaintiff urged that the proviso made an unjust discrimination between companies doing the same business by the same means, and imposed a tax on their property because the business of one is large and the other small and that as the tax was not on the business but on the property "each dollar's worth should be treated alike". This Court rejected the contention and pointed out that such rigid equality has not been enforced; that in taxation there is a broader power of classification than in some other exercises of legislation. After reviewing numerous previous cases sustaining all manner of classifications and exemptions, the Court reiterated the principle: "Granting the power of classification, we must grant government the right to select the differences upon which the classification shall be based, and they need not be great or conspicuous".

Nor can it be said that because there may be competition between the business taxed and the business not taxed, that the classification made by the state is unconstitutional. Mere competition between them is not enough to show that two businesses must be burdened alike. *Heisler v. Thos. Colliery Co., 260 U. S. 245, 43 S. Ct. 83; Ohio Oil Co. v. Conway, 281 U. S. 146, 50 S. Ct. 310; Union Bank & Trust Co. v. Phelps, 288 U. S. 181, 53 S. Ct. 321; Puget Sound P. & L. Co. v. City of Seattle, 291 U. S. 619, 54 S. Ct. 542.*

We respectfully submit that the State Legislature reasonably might have determined that there was fair ground for distinction between newspapers having a circulation of more than 20,000 copies per week, and those falling below that number; that upon the record in this case there is no basis for holding that its action was arbitrary, capricious, or wholly unreasonable; and that the plaintiffs have utterly failed to show just ground in support of their complaint that the statute here involved deprives them of the equal protection of the laws.

Part VII.

CLASSIFICATION UNDER CONSTITUTION OF LOUISIANA.

The bill (paragraph XIII-[1]), (R. 6) incorrectly states the provisions of *Section 8 of Article X of the Constitution of Louisiana of 1921*, and the assertion, in argument, that these provisions are substantially identical with the provisions on the same subject in the Constitutions of 1879, 1898 and 1913, is not supported by comparison.

Under the system of State Government the legislative power is restricted only in so far as a positive prohibition is contained in the State Constitution.

The Constitution of Louisiana specifically vests the power of taxation in the Legislature *(Const. 1921, Art. X, Sec. 1). Interstate Tax Bureau, Inc., v. Conway, 180 La. 453, 156 So. 463.*

Under the Louisiana Constitutions of 1879, 1898 and 1913, as interpreted and construed by the Louisiana Supreme Court, the Legislature was prohibited from levying an occupational license tax, unless it graduated "the amount of such tax to be collected from persons pursuing the several trades, professions, vocations and callings". The Legislature was not permitted to select classes of persons for the imposition of an occupational license tax, nor could it classify the tax or make it progressive. The pertinent portions of the provisions of these Constitutions are identical and read as follows:

> "The General Assembly may levy a license tax, and in such case shall graduate the amount of such tax to be collected from the persons pursuing the several trades, professions, vocations and callings. All persons, association of persons and corporations pursuing any trade, profession, business or calling, may be rendered liable to such tax - - - ." *Const. 1879, Art. 206; Const. 1898, Art. 229; Const. 1913, Art. 229.*

The pertinent portion of *Sec. 8 of Art. 10 of the Louisiana Constitution of 1921* reads as follows:

> "License taxes may be levied on such classes of persons, associations of persons and corporations

pursuing any trade, business, occupation, vocation or profession, as the Legislature may deem proper, - - - - . Such license taxes may be classified, graduated or progressive."

These provisions, far from being substantially identical with those of previous constitutions, are, on the contrary, radically different. For the first time the Constitution of 1921 specifically authorized classification, eliminated the requirement as to graduation, and vested upon the Legislature the authority to levy occupational license taxes on such CLASSES of persons, associations of persons and corporations "AS THE LEGISLATURE MAY DEEM PROPER". It further authorized the Legislature, with regard to the taxes, to classify them, graduate them or make them progressive.

The Legislature's power with regard to occupational license taxes was materially and radically changed in two respects. Upon it was vested the discretion of dividing persons, associations of persons and corporations into classes as it deemed proper; it was also vested with the discretion, when it imposed such tax upon such classes of persons, associations of persons and corporations as it deemed proper, to classify the tax, to graduate the tax or to make the tax progressive.

The instant case is controlled by the provisions of the Constitution of 1921. The only importance in noting the change between the provisions of that Constitution and those of previous Constitutions is to avoid being misled by decisions of the Louisiana Supreme Court rendered prior to the Constitution of 1921.

In argument below the appellees relied on cases decided under the previous Constitutions; and cited only one case decided since 1921, that of *State v. Banner Cleaners & Dyers, Inc., 170 La. 76, 127 So. 370.*

That case is authority for only one proposition, viz: that the Legislature having established a class and having undertaken to graduate the tax on that class, must complete the graduation.

Since that case the Supreme Court of Louisiana has sustained classifications both as to subjects and as to the rate of taxation. See *State v. Heyman, 178 La. 479, 151 So. 901; State v. Wilson & Co., Inc., of La., 179 La. 648, 154 So. 636* (appeal dismissed by Supreme Court of United States for want of a substantial federal question, October 8, 1934, *55 S. Ct. 78*).

In the *Heyman* case the Court sustained a tax based upon a percentage of the gross receipts derived from the business of operating an office building, and rejected the contention that the tax was not graduated because there was no minimum fixed which operated to exempt those who derived no revenue from the operation of office buildings.

In the *Wilson* case the Court held valid and constitutional a license tax of 1¼% on gross sales from wholesaling meat products against the contention that such tax was not graduated.

The statute assailed presents no infirmities under the Constitution of Louisiana. The State Legislature has established a class, as it had the right to do; it imposed a

lawful tax upon all falling within said class; and fixed the measure of the tax at a definite percentage of gross receipts. What objection there can be to the statute under the Constitution of Louisiana is not clear.

The lower court though holding the statute unconstitutional under the Louisiana Constitution, did not say how or why the statute offended the State Constitution. Obviously it could discover no reason in support of the conclusion, for had one been discernible it would have been simple to state it. Courts have no right to thus lightly brush aside the presumption of constitutionality which attaches to every legislative act.

CONCLUSION.

We submit:

That neither under the averments of the bill of complaint, nor under the evidence, is there a matter presented within the jurisdiction of the lower court.

That where the action in the federal equity court is one *in personam*, such court has no power to enjoin the bringing of a personal action in another court of concurrent jurisdiction; and when the controversy is one within the provisions of *Section 266 of the Judicial Code* no order or decree can lawfully be entered preventing the bringing of a suit in a court of the state to enforce the statute.

That no case has been made out by the appellees justifying interference by a federal court of equity.

That the classification adopted by *Act No. 23 of the Louisiana Legislature of 1934* does not deny to the appellees equal protection of the laws.

That the decree of the lower court should be reversed and the bill dismissed at appellees' cost.

Respectfully,

GASTON L. PORTERIE,
Attorney General of Louisiana;
CHARLES J. RIVET,
Special Assistant to the Attorney General of Louisiana,
ATTORNEYS FOR APPELLANT.

APPENDIX.

Judicial Code, Sec. 24. Original Jurisdiction. The District Courts shall have original jurisdiction as follows:

First. Of all suits of a civil nature, at common law or in equity, - - - where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States.

Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any state, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.

Revised Statute 1979:

Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Act No. 16. Second Extra Session of 1934, Louisiana Legislature.

AN ACT

To carry into effect Section 18, Article X of the Constitution of Louisiana, and to provide against the issuance of process to restrain the collection of any tax and for a complete and adequate remedy for the prompt recovery by every tax payer of any illegal tax paid by him.

Section 1. Be it enacted by the Legislature of Louisiana, That no court of this State shall issue any process whatsoever to restrain the collection of any tax imposed by the State of Louisiana, or by any political subdivision of the State of Louisiana, under authority granted to it by the Legislature or by the Constitution.

Section 2. Any tax payer who has paid any tax, the whole or any part of which has been declared illegal by any court of competent jurisdiction, shall be reimbursed for the amount of the tax so declared to be illegal, as follows:

1. The tax collector shall pay and reimburse the taxpayer for the amount of the tax declared to be illegal out of any funds in his possession, collected or to be collected by him, from the same source as the tax involved in such litigation; or

2. The State Treasurer, or the treasurer of any political subdivision, shall pay and reimburse the tax payer the amount of the tax so declared to be illegal out of any funds in his possession, under his control, or on deposit in such treasury, derived from the same source as the tax involved in such litigation; or

3. The Legislature, as to taxes imposed by the State of Louisiana, shall make appropriations to

pay the amount of the taxes so declared to be illegal; or

4. The political subdivision which has imposed any such tax shall make an appropriation to pay the amount of the tax so declared to be illegal out of funds derived from the same source as the tax involved in any such litigation, or shall include the amount of the tax declared to be illegal in a supplemental budget for its current year or in its next regular budget after judgment has become final, the same to be paid out of funds derived from the same source as the tax involved in such litigation.

Section 3. This Act shall not be held to repeal any law providing that tax payers shall have the right of testing the correctness of their assessments before the courts of the State, except insofar as such laws or parts of laws may be in conflict with this Act.

Approved by the Governor: November 21, 1934.

State of Louisiana

ACT No. 23 OF REGULAR SESSION OF 1934

Newspaper and Picture Show Advertising Tax

Issued by

Supervisor of Public Accounts

BATON ROUGE, LA.

EFFECTIVE AUGUST 1, 1934

ACT No. 23.

House Bill No. 343. By Messrs. Burgess, Gardiner, Heywood and Wimberly.

AN ACT

To provide additional revenue for the State of Louisiana by levying a license tax, in addition to all other licenses and taxes now levied and assessed in this State, upon every person, firm or corporation engaged in the business of selling, or making any charge for, advertising or for advertisements, whether printed or published, or to be printed or published, in any newspaper, magazine, periodical or publication whatever having a circulation of more than twenty thousand copies per week, or displayed and exhibited, or to be displayed and exhibited, by means of moving pictures; to require reports of such business, in aid of the collection of such license tax, and to provide for such collection and for the adoption of regulations relative thereto; to fix penalties for violations of this Act or of any of said regulations; and to provide for the disposition of the proceeds of such license tax.

Levying license tax of 2% of gross receipts on newspaper advertisements.

Section 1. Be it enacted by the Legislature of Louisiana, That every person, firm, association or corporation, domestic or foreign, engaged in the business of selling, or making any charge for, advertising or for advertisements, whether printed or published, or to be printed or published, in any newspaper, magazine, periodical or publication whatever having a circulation of more than 20,000 copies per week, or displayed and exhibited, or to be displayed and exhibited, by means of moving pictures, in the State of Louisiana, shall, in addition to all other taxes and licenses levied and assessed in this State, pay a license tax for the privilege of engaging in such business in this State of two per cent. (2%) of the gross receipts of such business.

Quarterly reports to be filed with Supervisor of Public Accounts.

Section 2. That on the 1st day of October, 1934, for the period August 1, 1934, to September 30, 1934, inclusive, and thereafter, on each first day of January, April, July and October, for the preceding quarter of the year, every person, firm, association or corporation, domestic or foreign, engaged in such business, or who has transacted any such business, shall file with the Supervisor of Public Accounts a sworn report showing the amount of gross receipts for such business during the period covered by said report.

Sworn reports.

Section 3. The Supervisor of Public Accounts shall have authority to require reports sworn to cover any transaction during the same period, similar to those provided for in

Section 2, of any person, firm, association or corporation who has paid for such advertising service.

Reports to be accompanied by remittance.

Section 4. Every such person, firm, association or corporation who is required to submit a report, as provided in Section 2, shall accompany such report by a remittance to the Supervisor of Public Accounts, in lawful money of the United States, or by certified check, or by any other means as may be authorized by said Supervisor of Public Accounts, of the amount of the tax shown to be due by said report, or two per cent. (2%) of the gross amount of any such business done during the period covered by such report. The Supervisor of Public Accounts is authorized to audit and revise any report filed under this Act, and to assess additional taxes when and as shown to be due, notice of any such additional taxes to be given by mail to the taxpayer or person owing the tax; and any such taxpayer shall have the right to contest any such assessment in the District Court of the Parish of East Baton Rouge. Provided, that the burden of proving any claim made as to any such report shall be upon the plaintiff.

Refunds.

Section 5. In cases where it is established to the satisfaction of the Supervisor of Public Accounts that a payment or payments have been made under this Act that were not due and collectible, the Supervisor of Public Accounts is authorized to refund such payments out of any funds on hand, collected by virtue of this Act, and not remitted to the State Treasurer according to law.

Rules and Regulations.

Section 6. The Supervisor of Public Accounts is authorized to adopt, and publish in the official journal of the State, reasonable rules and regulations for the purpose of efficiently carrying out the purposes of this Act.

Delinquent taxes.

Section 7. All taxes levied by this Act are due on the day following the last day of the quarter year, as to the business or transactions done or had during such quarter year, and shall become delinquent on the thirtieth day following the last day of the quarter in which such business was transacted; and such delinquent taxes shall bear interest at the rate of one per cent. (1%) per month from their due date, until paid.

Interest and attorney fees.

Section 8. In case it becomes necessary to enforce payment of any tax due under this Act, the Supervisor of Public Accounts may institute suit, in any court of competent jurisdiction, for the amount of the tax and interest, and may also include in such suit a demand for a penalty of 25% of the amount of the tax and interest, as attorneys' fees, which said penalty is hereby imposed upon any taxpayer against whom it is necessary to proceed, and shall be taxed as costs and included in the judgment rendered;

execution of which judgment, shall take place as provided by existing laws.

Failure or refusal to file report and pay tax.

Section 9. It shall be unlawful for any person, firm, association or corporation, required to file a report or to pay a tax by this Act or by any regulation issued under authority thereof, or any managing agent or officer of any such firm, association or corporation.

(1) To fail, neglect or refuse to file the aforesaid sworn report at the time and in the manner and form prescribed, or to pay any tax due under this Act prior to its becoming delinquent; and

(2) To make any false statement in said sworn report, or to make any false representations to the Supervisor of Public Accounts as to any tax levied by this Act.

Penalty.

And any person violating any provision of this Act shall be deemed guilty of a misdemeanor and, on conviction, shall be fined not exceeding Five Hundred Dollars ($500.00) or imprisoned not exceeding six months, or both, at the discretion of the court, for each violation.

As to corporations violating this Act, there shall be recovered, at the suit of the district attorney, an amount not exceeding Five Hundred Dollars ($500.00) for each violation.

Prosecutions and suits.

The venue of prosecutions and suits under this Act shall be the parish where the report was made or the tax computed by the taxpayer, or the parish where the business was transacted, or payment therefor received; but as to corporations not maintaining their records in this State, all such proceedings shall be brought at the domicile of their agents for service.

Supervisor of Public Accounts authorized to inspect books and records.

Section 10. For the purpose of enforcing the collection of the tax levied by this Act, the Supervisor of Public Accounts is hereby specifically authorized and empowered to examine, at all reasonable hours, the books, records and other documents of all persons, firms, associations or corporations who have transacted any of the business described in Section 1 hereof, or who are liable for any tax under this Act, or as to the business of whom there is levied the tax provided by this Act, in order to determine and provide for a correct check and ascertainment of the true amount due. In the event that any person, firm, association or corporation, or the employee, agent or officer of said firm, association or corporation, shall refuse to permit such examination of such books, records and other documents by the Supervisor of Public Accounts, as aforesaid, said officer may proceed by rule, in chambers or in open court, in or out of term time, in any court of competent jurisdiction, in the parish where such refusal occurred, and require said person, firm, association or corporation, or employee, agent

or officer of said firm, association, or corporation to show cause why the Supervisor of Public Accounts should not be permitted to examine said books, records, or documents; and in case said rule be made absolute, the same shall be considered a judgment of the court and every violation thereof deemed a contempt of the court, to be punished according to law.

Proceeds collected to be paid quarterly to credit of "Property Tax Relief Fund."

Section 11. The Supervisor of Public Accounts shall make remittance to the State Treasurer, not later than the 30th day after the last day of the preceding quarter, of all taxes, interest and penalties collected by him during the said quarter, and the Treasurer shall place the same to the credit of the Property Tax Relief Fund, to be disbursed and disposed of as provided in the Act creating such fund. Provided that the sum of Two Thousand Dollars ($2,000.00) per month of such collections may be withheld by the Supervisor of Public Accounts for the expense of enforcing this Act.

Change of title of collector of tax.

Section 12. Should the collection of State taxes be transferred by the Legislature from the Supervisor of Public Accounts to any other office, board, commission, officer, or official in whom is vested the collection of the taxes herein levied, said new collector shall have all the authority vested in the Supervisor of Public Accounts by this Act, and the title of such officer, board, commission, office or official shall be substituted for "Supervisor of Public Accounts", where the same appears in any provision of this Act.

Constitutionality.

Section 13. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of said Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

Approved by the Governor: July 12, 1934.

A true copy:

E. A. CONWAY,
Secretary of State.